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No. ____

SUPREME COURT, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS, INC.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, preempts state common-law tort claims that are based on inadequate labeling of pesticide products or failure to warn about the harmful effects of such products.

2. Whether the statutory and regulatory regime that was established after FIFRA was amended in 1972 now operates to preempt state common-law tort claims that are based on the inadequacy of labels on, or warnings relating to, pesticide products that were distributed and sold prior to the 1972 amendments to FIFRA.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Arkansas-Platte & Gulf Partnership respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado (App. 14a, *infra*) is reported at 748 F. Supp. 1474 (D. Colo. 1990). The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a, *infra*) is reported at 959 F.2d 158 (10th Cir. 1992).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 6, 1992. *See* App. 1a. A timely motion for rehearing was denied on

April 16, 1992. *See* App. 37a. On July 1, 1992, Justice White signed an order extending the time within which to file this petition to and including July 31, 1992. *See* App. 39a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y, provides in pertinent part as follows:

> § 136v. Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> * * * *
>
> § 136(p) Label and labeling.—
>
> (1) Label.—The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.
>
> (2) Labeling.—The term "labeling" means all labels and all other written, printed, or graphic matter—
>
> (A) accompanying the pesticide or device at any time, or
>
> (B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United

States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

STATEMENT OF THE CASE

The federal preemption questions presented here arise out of a products liability suit involving pesticide products containing the chemical pentachlorophenol ("penta"). Petitioner Arkansas-Platte & Gulf Partnership ("AP&G") filed its complaint against respondents The Dow Chemical Company ("Dow") and Van Waters & Rogers, Inc., ("Van Waters") in the District Court for the County of El Paso, State of Colorado, on September 1, 1989. Pursuant to 28 U.S.C. § 1441(a), the case was removed to the United States District Court for the District of Colorado, which had original jurisdiction over the case based on diversity of citizenship. 28 U.S.C. § 1332.

In its complaint, AP&G states, in substance, that it owns certain ranch property in Colorado (the "Property") upon which AP&G's predecessors-in-interest operated a wooden fence post treatment facility from approximately 1960 until 1972. AP&G alleges that the wood treatment facility used penta products that were manufactured, supplied, or distributed by the respondents, and that the Property became contaminated with penta and other chemicals contained in those penta products as a result of drips and spills occurring during the course of the wood treatment operation. In the fall of 1987, after AP&G had succeeded to ownership of the Property, one of AP&G's employees on the Property informed AP&G that he had received a medical diagnosis of penta poisoning. Subsequent soil tests revealed penta contamination on the Property. AP&G commenced a remediation program on the Property, incurring substantial expense. AP&G alleges that the respondents' failure to provide

sufficient warnings regarding their penta products, including their failure to provide any caution against soil contamination, was a direct cause of the Property contamination, and AP&G asserts Colorado state tort law claims of negligence and strict liability based on the alleged failure to warn.

On January 31, 1990, Dow filed a summary judgment motion, which Van Waters subsequently joined in. Among other things, the respondents contended that AP&G's state tort law claims of inadequate warning are preempted by FIFRA. The motion was extensively briefed, oral argument was had (at which time the district court denied all grounds for summary judgment except that based on FIFRA preemption), and on October 22, 1990, the court issued its order denying the defendants' motion for summary judgment on FIFRA preemption grounds. *See* App. 14a. The respondents' subsequent motion for reconsideration was denied; however, the district court certified the question of FIFRA preemption for interlocutory appeal to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1292(b). *See* App. 34a. On February 26, 1991, the court of appeals granted the respondents' petition for leave to appeal under 28 U.S.C. § 1292(b). *See* App. 36a.

The sole issue on appeal was whether the federal government, through FIFRA, has preempted AP&G's state-law tort claims that are based on the respondents' failure to provide adequate warnings about the harmful effects of the penta products that were used on the Property by AP&G's predecessors-in-interest from approximately 1960 to 1972. The respondents argued that AP&G's claims are expressly preempted by 7 U.S.C. § 136v(b), which became part of the FIFRA statute in late 1972, and which prohibits states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." Alternatively, the respondents argued that AP&G's claims are implicitly preempted by (i) the current FIFRA's

occupation of the field of pesticide labeling and (ii) a conflict between AP&G's claims of inadequate warning and the current FIFRA's regulation of pesticides.

In response, AP&G argued that, under the standards of statutory construction set forth by this Court, only the FIFRA statute and regulations in effect prior to the enactment of the 1972 FIFRA amendments should be considered for purposes of the preemption analysis in this case, where the respondents' acts and omissions that gave rise to AP&G's claims occurred prior to the 1972 enactment, and where Congress expressly directed that, for purposes of determining liability to third persons in respect of any act or omission occurring prior to the 1972 FIFRA enactment, FIFRA should be treated as if the 1972 legislation had not been enacted. However, AP&G additionally contended that, whether pre-1972 or current federal law is applied, FIFRA does not preempt AP&G's tort claims under this Court's framework for preemption analysis, where, among other things, (i) there is no evidence of any legislative intent to insulate pesticide manufacturers from common-law liability through FIFRA; (ii) FIFRA provides no alternative relief for persons injured by inadequate pesticide warnings, including warnings that have never even been submitted to or approved by either of the federal agencies that have administered FIFRA; and (iii) the agencies that have administered FIFRA have themselves expressed their belief that FIFRA provides minimum labeling standards, but does not dictate everything that goes on a label and does not relieve a company of its responsibility for providing adequate labeling.[1]

On March 6, 1992, the court of appeals issued its opinion, holding that "state tort actions based on labeling and alleged failure to warn are impliedly preempted by

[1] Under FIFRA, companies draft their own product labels; two different manufacturers may therefore have markedly different labels affixed to their chemically identical products.

FIFRA as a matter of law." *See* App. 13a. In reaching that conclusion, the court first rejected AP&G's contention that the FIFRA preemption analysis in this case should be governed by the FIFRA statute and regulations that were in effect when the respondents' allegedly tortious acts and omissions occurred. In doing so, the court asserted that applying current FIFRA law to past events presents no question of retroactivity, and thus triggers no presumption against retroactive application of a statute, because " 'a statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to the enactment.' " *See* App. 6a (quoting *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972)). In addition, the court asserted that "any jury award on claims arising from a duty to label or warn has an impact on FIFRA as it presently exists" because a jury award today would cause manufacturers to change the labels on their products. *See id.* On those grounds, and with no discussion of Congress's express directive to the contrary, the court concluded that the preemption issue should be analyzed under FIFRA as it currently exists. *See* App. 3a-6a.

In the FIFRA preemption analysis that followed, the court began by acknowledging a conflict in the courts regarding the issue of whether the current FIFRA preempts state tort claims based on labeling and alleged failure to warn. *See* App. 7a. The Eleventh Circuit, in a decision recently vacated by this Court, has held such claims to be impliedly preempted. *See Papas v. Upjohn Co.*, 926 F.2d 1019, 1021-26 (11th Cir. 1991), *cert. granted, judgment vacated, and case remanded sub nom. Papas v. Zoecon*, 60 U.S.L.W. 3878 (U.S. June 29, 1992). The D.C. Circuit has held such claims to be neither expressly nor impliedly preempted. *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1539-43 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). In the instant case, the court expressly rejected the D.C. Circuit's holding in

Ferebee, electing instead to follow the Eleventh Circuit's *Papas* decision. In doing so, the court stated that "[s]tate court [sic] damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards," which would hinder the accomplishment of FIFRA's purpose of ensuring uniform labeling standards. *See* App. 8a. In addition, the court considered and rejected the D.C. Circuit's distinction between, on the one hand, a state's direct regulatory command that a manufacturer must change its label and, on the other hand, a jury award of damages to compensate a victim of inadequate warning under state tort law. The court found that "[a] business choice between paying damages and changing the label is only notional," and such a choice "cannot be consistent with FIFRA's preclusion of 'any requirements for labeling or packaging in addition to or different from' the statutory mandate," citing 7 U.S.C. § 136v(b). *See* App. 9a-10a. On that basis, the court found AP&G's tort claims based on inadequate warning or labeling to be impliedly preempted by FIFRA, and did not reach the issue of express preemption. *See* App. 13a.

On March 20, 1992, AP&G filed a petition for rehearing, as well as a suggestion for rehearing en banc, on the issue of whether the preemption analysis should be governed by FIFRA amendments that were enacted after the respondents' allegedly tortious acts and omissions occurred. On April 16, 1992, the court summarily denied the petition for rehearing and the suggestion for rehearing en banc. *See* App. 37a.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S HOLDING THAT FIFRA IMPLIEDLY PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE LABELING OR FAILURE TO WARN, LIKE THE ELEVENTH CIRCUIT'S SIMILAR HOLDING IN *PAPAS*, MUST NOT BE PERMITTED TO STAND AS BINDING OR PERSUASIVE AUTHORITY WITHOUT REVIEW OR RECONSIDERATION IN LIGHT OF THIS COURT'S DECISION IN *CIPOLLONE*

On June 24, 1992, this Court issued its long-awaited decision in *Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703 (U.S. June 24, 1992), addressing, among other things, federal preemption of state common-law tort claims of inadequate warning. Though *Cipollone* involved a different federal statute, with different preemptive language and a different regulatory scheme, the plurality opinion in that case set forth an analytical framework for federal preemption cases that is directly applicable to the FIFRA preemption issues raised in this case and in the Eleventh Circuit's *Papas* case, and that further calls into question the reasoning that led each of those circuit courts to conclude that, among other things, state common-law tort claims of inadequate labeling are impliedly preempted by FIFRA.

Central to this Court's preemption analysis in *Cipollone* were two principles of statutory construction. First,

> [w]hen Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to preempt state laws from the substantive provisions' of the legislation. . . . Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.

60 U.S.L.W. at 4707 (citations omitted). Second, "in light of the presumption against the pre-emption of state police power regulations," *see id.*, preemption should not be inferred unless that is the "clear and manifest" purpose of Congress, *see id.* at 4706, and express preemptive provisions in federal statutes should be narrowly read. *See id.* at 4707.

There is simply no way to reconcile the Eleventh Circuit's analysis in *Papas*, and the Tenth Circuit's analysis in the instant case, with *Cipollone*'s principles of statutory construction. In both *Papas* and the instant case. the preemption analysis was conducted under the current FIFRA statute, which includes, in 7 U.S.C. § 136v(b), a provision that explicitly addresses the issue of preemption. In *Papas*, the Eleventh Circuit admitted to "a little uncertainty" about whether section 136v(b) expressly preempts common-law tort claims of inadequate labeling, and therefore elected to "pass over the question of express preemption," choosing instead to consider whether preemption "can be inferred from FIFRA and the labeling regulations promulgated under it." *Papas*, 926 F.2d at 1024. In the instant case, the Tenth Circuit did not even *reach* the issue of express preemption. *see* App. 13a, and instead used the language of section 136v as a partial basis for concluding that "state tort actions based on labeling and alleged failure to warn are *impliedly* preempted by FIFRA as a matter of law." *Id.* (emphasis added). By "passing over" the question of which state actions were expressly preempted by Congress in section 136v(b) and by using FIFRA's substantive provisions and regulatory scheme to expand section 136v(b)'s preemptive reach through doctrines of implied preemption, the two circuit courts adopted an analytical framework that does not survive *Cipollone*'s directive to give express preemptive provisions both exclusive and narrow effect.

Five days after issuing its decision in *Cipollone*, this Court granted the plaintiffs' petition for a writ of cer-

tiorari in *Papas*, and summarily vacated the Eleventh Circuit's judgment and remanded the case for further consideration in light of *Cipollone*. *See* 60 U.S.L.W. 3878 (U.S. June 29, 1992). In light of the similarity of the issues raised and the analysis undertaken by the circuit courts in *Papas* and the instant case, and in light of the Tenth Circuit's express agreement with and reliance on the Eleventh Circuit's opinion in *Papas*, *see* App. 8a, AP&G respectfully submits that, at a minimum, this Court should permit the Tenth Circuit the same opportunity given to the Eleventh Circuit to reconsider its judgment in light of *Cipollone*. However, AP&G would further point out three additional reasons, not present in *Papas*, that make further review or reconsideration of the Tenth Circuit's judgment in this case appropriate in light of *Cipollone*.

First, as noted earlier, *see supra* at 9, the Tenth Circuit did not even *reach* the issue of express preemption, despite the existence of an express preemptive provision. In bypassing, without comment, the question of section 136v(b)'s express preemptive reach, and moving directly to implied preemption doctrines based on congressional occupation of the field and conflict between state and federal law, *see* App. 13a, the Tenth Circuit's analysis was squarely at odds with the dictates of *Cipollone*.

Second, whereas the Eleventh Circuit's holding of preemption was confined to claims against manufacturers of "EPA-registered pesticides," *see Papas*, 926 F.2d at 1026, the Tenth Circuit's holding in the instant case is not so confined, and therefore more clearly violates *Cipollone*'s admonition that express preemptive provisions are to be narrowly read.[2]

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[2] In this regard, it should be noted that, in both the district and circuit courts in this case, AP&G pointed out that the defendants never produced evidence, in support of their motion for summary judgment, that any federal agency ever determined, through the

Third, and most important, where it is undisputed in this case that AP&G's claims of inadequate warning are based on acts and omissions that occurred prior to the 1972 amendments to FIFRA, including the addition of the express preemption provision of section 136v(b), the Tenth Circuit's decision to analyze the preemption issue under the current FIFRA is contrary to the analysis in *Cipollone*, which applied the federal statute in effect at the time of the allegedly tortious acts and omissions to determine whether later-accruing common-law tort claims based on those acts and omissions would be preempted.[3]

AP&G believes that the Tenth Circuit's opinion clearly warrants review. At a minimum, this Court should, consistent with its treatment of *Papas*, grant this petition for a writ of certiorari, summarily vacate the judgment below, and remand the case to the Tenth Circuit for further consideration in light of *Cipollone*.

FIFRA registration process or otherwise, that the relevant product labels in this case met FIFRA's statutory standards.

[3] *See, e.g.*, 60 U.S.L.W. at 4709 ("insofar as claims under either failure to warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted"); *cf. id.* at 4716 ("To the extent petitioner's claims are premised specifically on respondents' failure (during the period in which the 1965 Act was in force) to include in their advertising any statement relating to smoking and health, I would find those claims, no less than the similar post-1969 claims, pre-empted.") (opinion of Scalia, J.) (emphasis in original omitted). Moreover, as the Third Circuit's discussion in *Cipollone* makes even clearer, the date on which the plaintiffs' claims arose under state law does not determine which version of the federal statute governs the preemption analysis. *See, e.g., Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 546, 580-81 (3d Cir. 1990) (plaintiffs' claims based upon defendants' behavior prior to the enactment of preemptive statutory language in 1966 were not preempted, even though plaintiffs' claims may not have arisen until 1981 or later, at which time federal statute's preemptive provision was already in effect), *rev'd in part as to other matters*, 60 U.S.L.W. 4703 (U.S. June 24, 1992).

II. THE TENTH CIRCUIT'S HOLDING ON PREEMPTION BY POST-1972 FIFRA EXPRESSLY REJECTS THE D.C. CIRCUIT'S HOLDING ON THE SAME ISSUE AND CONFLICTS WITH SUBSEQUENT HOLDINGS OF THE FOURTH CIRCUIT AND ONE STATE COURT OF LAST RESORT; MOREOVER, THERE IS A GREAT AND RECURRING SPLIT OF AUTHORITY ON THE ISSUE IN FEDERAL AND STATE COURTS THAT SHOULD BE RESOLVED BY THIS COURT

The first federal circuit court decision on the preemptive effect of post-1972 FIFRA on state common-law claims of inadequate warning or labeling was the D.C. Circuit's decision in *Ferebee*, which was issued in 1984.[4] In *Ferebee*, the court considered, and proceeded to reject, a pesticide manufacturer's contention that FIFRA preempts state common-law actions based on inadequate labeling. The court noted that, unlike FIFRA, common-law actions for damages have compensatory, and not merely regulatory, aims. Verdicts against manufacturers in these cases serve the legitimate state goals of providing compensation to injured parties and providing manufacturers with an incentive to submit more detailed or useful labels to the EPA for approval; that the state may not be permitted under FIFRA to directly order a change in an EPA-approved label does not prevent the state from furthering its legitimate goals through the imposition of traditional tort liability. *See* 736 F.2d at 1541-42. Moreover, said the court, Congress has not explicitly preempted state damage actions; nor is compliance with both federal and state law impossible, since a manufacturer can either change its label or continue to use its existing label and simultaneously pay damages

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[4] In 1980, the Second Circuit stated broadly, and perhaps as dicta unnecessary to its disposition of the case, that "FIFRA was not intended to preempt state law even with respect to those matters which it specifically regulates." *See In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 995 n.14 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

to successful tort plaintiffs; nor do state damage actions stand as an obstacle to the accomplishment of FIFRA's purposes, since Congress has expressed no clear and manifest purpose to subsidize the pesticide industry through FIFRA by forcing states to accept the use of EPA-registered pesticides and tolerate uncompensated injuries to citizens. *Id.* at 1542-43.

Ferebee stood as the only federal circuit court decision on this preemption issue until the Eleventh Circuit's 1991 *Papas* decision and the Tenth Circuit's decision this year in the instant case. In each of those two later cases, the court acknowledged the holding in *Ferebee* but nevertheless held that FIFRA preempted state tort claims of inadequate labeling or warning. Neither court based its rejection of *Ferebee* on intervening statutory changes; indeed, though FIFRA was extensively revised in 1988, *see* Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2655, Congress made no effort to statutorily overrule the D.C. Circuit's *Ferebee* decision. Neither court attempted to distinguish *Ferebee* on its facts, nor did either court suggest that this Court's framework for preemption analysis had materially changed since *Ferebee*. Instead, the Tenth and Eleventh circuits flatly and unambiguously refused to follow the D.C. Circuit's holding.

Since the Eleventh Circuit's *Papas* decision and the Tenth Circuit's decision in this case, one state court of last resort and one additional federal circuit court have ruled on this FIFRA preemption issue. Both courts expressly acknowledged the conflict among *Ferebee*, *Papas*, and the Tenth Circuit's opinion in this case. In *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 1992 Ark. LEXIS 382 (1992), the Supreme Court of Arkansas, while finding some of the criticism of the *Ferebee* opinion to be justified, nevertheless held that "state common law tort claims for inadequate labeling are neither expressly nor impliedly preempted by FIFRA." 1992 Ark. LEXIS 382, at *13-25.

In *Worm v. American Cyanamid Co.*, No. 91-1749, 1992 U.S. App. LEXIS 14154 (4th Cir. June 19, 1992), a case involving an EPA-registered herbicide, *see* 1992 U.S. App. LEXIS 14154, at *3, the Fourth Circuit took an intermediate position, finding preemption only to the extent that the establishment or enforcement of a common-law duty "would impose a labeling requirement inconsistent with those established by FIFRA." *Id.* at *22. Under that standard, the court noted that state common-law claims "based on breach of a federally imposed standard," *id.* at *21, or based on a state-imposed standard that is identical to the federal standard, *see id.* at *15, would not conflict with federal law and would not be preempted by FIFRA.

As noted above, *supra* at 10, this Court has since vacated the Eleventh Circuit's decision in *Papas*; however, the Tenth Circuit's decision in this case still stands in conflict with the holdings and competing rationales of *Ferebee*, *Alter*, and *Worm*.[5] This conflict warrants resolution by this Court. *See* Rules 10.1(a) & (b), Rules of the Supreme Court of the United States.

Moreover, lower court opinions on this preemption issue show a similarly sharp, direct, widespread, and recurring conflict. In 1987, an opinion issued by the United States District Court for the Eastern District of Michigan rejected the D.C. Circuit's analysis in *Ferebee*, holding instead that FIFRA expressly preempts state tort claims of inadequate warning. *See Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 406-08 (E.D. Mich. 1987). Since *Fitzgerald*, federal district courts have variously held

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[5] AP&G would additionally note that the Sixth Circuit has recently affirmed, "[f]or the reasons stated in [the district court's] opinion and order of March 8, 1991," a grant of summary judgment on grounds that included, in the alternative, FIFRA preemption of failure-to-warn claims. *See National By-Products, Inc. v. Pope*, No. 91-5665 (6th Cir. Apr. 6, 1992) (not recommended for full-text publication).

state common-law tort claims of inadequate warning to be expressly preempted,[6] impliedly preempted,[7] and not preempted at all.[8] In at least three federal districts, different judges have reached conflicting holdings.[9] Federal district courts that have had the opportunity to consider the Eleventh Circuit's analysis in *Papas* as well as the D.C. Circuit's analysis in *Ferebee* have reached conflicting results.[10] The numerous opinions from lower state courts on this preemption issue likewise show a widespread conflict.[11]

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[6] *See Herr v. Carolina Log Bldgs., Inc.*, 771 F. Supp. 958 (S.D. Ind. 1989); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989).

[7] *See, e.g., Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991); *Mims v. Mobay Corp.*, No. M-88-157 (S.D. Tex. June 6, 1991); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989).

[8] *See, e.g., Perkins v. Northeastern Log Homes, Inc.*, No. C89-0564-L(M) (W.D. Ky. Feb. 26, 1992); *Montana Pole & Treating Plant v. I.F. Laucks and Co.*, 775 F. Supp. 1339 (D. Mont. 1991); *Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500 (W.D. Mo. 1991); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990); *Darrow v. Vacudyne, Inc.*, No. 88-CV-40467-FL, 1990 U.S. Dist. LEXIS 19564 (E.D. Mich. April 30, 1990); *Cannon v. Chapman Chem. Co.*, No. 88-2252 (W.D. Ark. Mar. 5, 1990); *Brooks v. S.C. Johnson & Son, Inc.*, No. 86-4136 (S.D. Ill. Jan. 10, 1990); *Whitener v. Reilly Indus., Inc.*, No. 87-5224 (S.D. Ill. Oct. 25, 1989); *Cox v. Velsicol Chem. Co.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Villari v. Terminix Int'l*, 692 F. Supp. 568 (E.D. Pa. 1988); *Wilson v. Chevron Chem. Co.*, No. 85 Civ. 762 (JFK) (S.D. N.Y. May 18, 1986).

[9] *Compare Riden, Evenson, and Darrow, supra* note 8, *with Fisher, Herr, and Fitzgerald, supra* notes 6 & 7 and accompanying text.

[10] *Compare Mims and Young, supra* note 7, *with Riden and Montana Pole, supra* note 8.

[11] Very recently, a three-judge appellate panel in Missouri split on the preemption issue. *See Yowell v. Chevron Chem. Co.*, No. 17605, 1992 Mo. App. LEXIS 1193 (Mo. Ct. App. July 13, 1992). The majority, relying principally on the Tenth Circuit's opinion in

The remarkable split in authority on this preemption issue has percolated through the judicial system long enough; indeed, the Ninth Circuit and the New Jersey Supreme Court have recently found the absence of judicial consensus on the issue to have achieved independent legal significance. *See Chem. Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941, 948 (9th Cir. 1992) ("The great split in authority is important to illustrate that even when the consequences of state action clearly pressure companies to change their FIFRA labels, there is no consensus on whether the state action is preempted."), *petition for cert. filed*, 60 U.S.L.W. 3844 (U.S. June 4, 1992) (No. 91-1957); *Feldman v. Lederle Lab.*, 592 A.2d 1176,

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the instant case, concluded that state tort claims of inadequate labeling are impliedly preempted by FIFRA. *See* 1992 Mo. App. LEXIS 1193, at *4-14. The dissent, however, concluded that, in light of this Court's decision in *Cipollone*, the Tenth Circuit wrongly decided the preemption issue, and should have found no preemption. *See id.* at *18-19. In California, an intermediate appellate court recently elected to follow *Ferebee* rather then the Eleventh Circuit's *Papas* decision and the Tenth Circuit's opinion in this case, and held that common-law tort claims were not preempted. *See Miranda v. Shell Oil Co.*, No. 188845 (Cal. Ct. App. Apr. 22, 1992). In Florida, an intermediate appellate court last year appeared to find preemption of such tort claims. *See Begley v. Truly Nolan Exterminating, Inc.*, 573 S.2d 1038 (Fla. Dist. Ct. App. 1991). Among the many trial court opinions on this issue, cases finding no preemption include *Chavolla v. Shell Chem.*, No. 548003 (Cal. Super. Ct. May 31, 1990); *Perry v. Dow Chem. Co.*, No. CL 88 10227AN (Fla. Cir. Ct. Palm Beach County June 29, 1989); *Privette v. Armour Exterminating*, No. 85-6279 CA (Fla. Cir. Ct. Palm Beach County Feb. 26, 1988 and Mar. 16, 1988); *Packowski v. Orkin Exterminating Co.*, No. 85-46671-NI (Mich. Cir. Ct. Kent County May 5, 1989). Cases finding preemption include *Southern Colo. Farms, Inc. v. Green*, No. 88 CV 40 (Colo. Dist. Ct. Saguache County June 7, 1991); *Brennan v. Dow Chem Co.*, No. CL-90-8882 AO (Fla. Cir. Ct. Palm Beach County June 3, 1991); *Fullmer v. Arab Termite & Pest Control, Inc.*, No. 29C 018907 CT415 (Ind. Cir. Ct. Hamilton County May 24, 1991); *Abelman v. Velsicol Chem. Corp.*, No. 12611 (Md. Cir. Ct. Montgomery County May 17, 1991); *Davidson v. Velsicol Chem. Corp.*, No. A-246535 (Nev. Dist. Ct. Clark County Apr. 5, 1991).

1190 (N.J. 1991) ("The split among courts addressing the issue suggests that there is not a 'clear and manifest' expression of congressional intent and calls into question the reasoning and authority of *Papas*."), *cert. denied*, 60 U.S.L.W. 3878 (1992). This issue is ripe for resolution by this Court.

III. IN HOLDING THAT THE STATUTORY AND REGULATORY REGIME THAT WAS ESTABLISHED AFTER FIFRA WAS AMENDED IN 1972 NOW OPERATES TO PREEMPT COMMON-LAW TORT CLAIMS THAT ARE BASED ON THE INADEQUACY OF LABELS ON, OR WARNINGS RELATING TO, PESTICIDE PRODUCTS THAT WERE DISTRIBUTED AND SOLD PRIOR TO THE 1972 AMENDMENTS TO FIFRA, THE TENTH CIRCUIT HAS IGNORED CONTRARY CONGRESSIONAL INSTRUCTIONS AND HAS DECIDED A MATTER OF STATUTORY RETROACTIVITY IN A WAY THAT CONFLICTS WITH THE DOMINANT STRAND OF APPLICABLE DECISIONS OF THIS COURT, INCLUDING THE DECISION IN *CIPOLLONE*

As this Court has previously noted, *see, e.g., Wisconsin Public Intervenor v. Mortier*, 501 U.S. ——, 115 L. Ed 2d 532, 540 (1991), the statutory and regulatory regime that currently exists under FIFRA is the result of a comprehensive revision of FIFRA undertaken by Congress in 1972 through the Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973, Pub. L. No. 92-516 (the "1972 Legislation"). Prior to the 1972 Legislation, FIFRA ("pre-1972 FIFRA") was primarily a licensing and labeling statute that (i) required all pesticides sold in interstate commerce to be registered with the Secretary of Agriculture (the "Secretary")[12] and (ii) contained

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[12] In 1970, regulatory authority under FIFRA was transferred from the Department of Agriculture ("USDA") and its Secretary to the newly-formed Environmental Protection Agency ("EPA")

"general standards setting forth the types of information necessary for proper labeling of a registered pesticide . . . ." *Monsanto*, 467 U.S. at 991. Like the current FIFRA, pre-1972 FIFRA had no provisions for private actions or for compensation for injuries caused by pesticides.

The limited role of pre-1972 FIFRA, even in the area of product labeling, is apparent in FIFRA regulations that were published in 1959 and were effective and substantially unchanged throughout the 1960s and early 1970s. For example, the regulations made various suggestions for pesticide labeling statements, but made clear that the exact wording used in the suggested labeling statements was not obligatory; moreover, manufacturers were told to use any added warnings or caution statements that any special characteristics or uses of their formulations indicated were necessary. *See, e.g.*, 24 Fed. Reg. 10,835, 10,855 (1959) (codified at 7 C.F.R. § 362.116 (d)). In the event that a registrant contemplated changes "in substance" in the labeling of a product, the regulations prescribed a procedure for obtaining a new or amended registration incorporating the changed label. *See* 24 Fed. Reg. at 10,848 (codified at 7 C.F.R. § 362.106 (h)). In general, the regulations quite clearly and explicitly set out the very limited role of pre-1972 FIFRA, its registration process, and its labeling standards:

> (1) Registration is a device to bring the economic poison to the attention of the Department of Agriculture and to furnish an opportunity to correct *obvious* faults in labeling. It does not place the responsibility for correct labeling upon the Department though the Department does advise relative to revi-

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and its Administrator. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). FIFRA regulations were transferred to EPA without change, except that the words "Department of Agriculture" in the regulations were deemed to mean "Environmental Protection Agency." *See* 7 C.F.R. Ch. XXVII (1971).

> sion of labeling, on the basis of available information. . . .
>
> (2) Registration is not to be understood as indicating the Department of Agriculture's approval or recommendation of the economic poison.
>
> (3) Federal registration does not remove the requirements for state registration in those states which require registration.

24 Fed. Reg. at 10,847 (codified at 7 C.F.R. §§ 362.106 (d)(1)-(3)) (emphasis added). *See also* 24 Fed. Reg. at 10,849 (codified at 7 C.F.R. § 362.109(d)): "No references to [a guarantee that a product has been registered under FIFRA] may be made on the label or in the labeling of the product since such reference would be likely to give the purchaser an unwarranted sense of security."

As the Tenth Circuit acknowledged below, *see* App. 4a, pre-1972 FIFRA contained no provisions specifically restricting state authority over pesticide labeling, in sharp contrast to the restrictions currently found in 7 U.S.C. § 136v(b).

In light of the very limited role of pre-1972 FIFRA and its lack of any preemptive language regarding state authority over pesticide labeling, any contention that pre-1972 FIFRA might preempt state tort claims based on inadequate warning would seem highly implausible. It appears that those courts that have considered the question have concluded as much. *See In re "Agent Orange" Product Liability Litigation*, 635 F.2d at 995 n.14 (noting that FIFRA was not intended to preempt state law even with respect to those matters it specifically regulates); *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (proceeding on the assumption that FIFRA did not occupy the field). *Cf. Griffin v. Planters Chem. Corp.*, 302 F. Supp. 937, 940, 944 (D. S.C. 1969) (manufacturer's duty to warn is over and above USDA's requirements); *Muncy v. Magnolia Chem. Co.*, 437 S.W.2d 15, 17-19 (Tex. Civ. App. 1968) (mere com-

pliance with labeling standards of FIFRA and Texas Insecticide, Fungicide, and Rodenticide Act does not establish freedom from negligence as a matter of law).

In the instant case, it is undisputed that, although AP&G's claims of inadequate warning did not arise under Colorado state law until after the discovery of penta contamination in 1987, those claims are based on acts and omissions that occurred prior to the 1972 Legislation. Moreover, as AP&G pointed out to both courts below, Section 4(e) of the 1972 Legislation provides that, "[f]or purposes of determining any criminal or civil penalty *or liability to any third person* in respect of any *act or omission* occurring before the expiration of the periods referred to in this section [which in no event could be earlier than October 21, 1972, when the 1972 Legislation was enacted], the Federal Insecticide, Fungicide, and Rodenticide Act shall be treated as continuing in effect as if this Act had not been enacted." *See* 1972 U.S.C.C.A.N. at 1170 (emphasis added). On the basis of that express congressional directive that the 1972 Legislation have only prospective application, and on the basis of this Court's holdings regarding the propriety of retroactive application of statutes, AP&G argued in the courts below that the FIFRA preemption issue must, under the facts of this case, be analyzed under the FIFRA statute and regulations as they existed prior to the 1972 Legislation.

Both of the courts below rejected AP&G's contention, and elected to analyze the preemption issue under the current FIFRA regime. The district court, citing this Court's opinion in *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696 (1974), asserted that a court "is bound to apply the law in effect at the time it renders its decision, unless there would result a manifest injustice." App. 18a. The Tenth Circuit, though recognizing that *Bradley*'s presumption in favor of statutory retroactivity appears to be in conflict with this Court's later decision in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988), *see* App. 5a n.1, nevertheless agreed with the district court

that pre-1972 FIFRA should not govern the preemption analysis. The Tenth Circuit stated that applying the 1972 Legislation to this case simply does not present any issue of retroactivity, both because AP&G's cause of action "arose" after 1972 and because, even if the cause of action "ripened" prior to 1972, " 'a statute is not rendered retroactive merely because the facts or requisites upon which a subsequent action depends are drawn from a time antecedent to the enactment.' " *See* App. 6a (quoting *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972)). The Tenth Circuit's only affirmative basis for applying the current FIFRA statute to this case was its expressed belief that a jury award today, though based on acts or omissions committed prior to the 1972 Legislation, would nevertheless have "an impact on FIFRA as it currently exists," because such an award would cause manufacturers to change their labels. *See id.* In concluding that the current FIFRA statute governs the preemption analysis in this case, neither court below even acknowledged the contrary congressional directive in Section 4(e) of the 1972 Legislation, despite repeated citations to it in the parties' briefs, at oral argument, and in AP&G's petition for rehearing.

The Tenth Circuit's decision to apply the current FIFRA to this case warrants this Court's review. First, even in *Bradley*, where this Court set forth "the principle that a court is to apply the law in effect at the time it renders its decision," *see* 416 U.S. at 711, an exception to that principle is recognized where "there is statutory direction or legislative history to the contrary." *Id.* The Tenth Circuit had no authority to disregard Congress's directive that pre-1972 FIFRA was to apply to liabilities arising out of acts and omissions that occurred prior to the 1972 Legislation, and substitute its own standard, which was based on the date on which a "cause of action" "arises" under state law. *See, e.g., Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because

they might deem its effects susceptible of improvement."). *See also, e.g., Goldstein v. California*, 412 U.S. 546, 551-52 (1973) (where congressional amendments to federal copyright law in 1971 expressly applied only to sound recordings that were "fixed" on or after February 15, 1972, the amendments could have no preemptive effect on state-law claims regarding recordings that were "fixed" prior to February 15, 1972).

Second, even apart from Congress's express directive to the contrary, the Tenth Circuit's application of current FIFRA law to the respondents' acts and omissions during the 1960s and early 1970s is defensible, if at all, only under an almost conclusive presumption that statutes have retroactive effect. The court's lone affirmative basis for applying the current FIFRA statute—that is, its speculation that a jury award today, based on inadequate pesticide warning labels distributed twenty or more years ago, would cause manufacturers to change their labels tomorrow, thus having "an impact on FIFRA as it currently exists"—is arguable only if manufacturers are not protected by preemption from state-law tort claims under the current FIFRA statute—a proposition that the court itself went on to reject. That asserted rationale for applying the current FIFRA statute obviously adds nothing to a mere presumption of statutory retroactivity. However, the dominant strand of this Court's discussions on statutory retroactivity suggests that such a presumption in this case is not warranted. *See, e.g., Bennett v. New Jersey*, 470 U.S. 632, 638-646 (1985) (absent clear legislative intent to the contrary, substantive provisions of 1978 statutory amendments would not be retroactively applied in determining if funds were misused during 1970-1972; instead, the stricter standards that were in effect at the time of the allegedly wrongful conduct would be applied).

This case provides the Court with an opportunity to sweep away much of the confusion in the lower courts regarding the propriety of applying subsequent statutory

amendments to prior conduct. However, in light of the express congressional directive that pre-1972 FIFRA was to apply to liabilities arising out of acts and omissions that occurred prior to the 1972 Legislation, and in light of this Court's preemption analysis in *Cipollone*, which applied the federal statute in effect at the time of the allegedly tortious acts and omissions of the defendants, *see supra* at note 3 and accompanying text, this Court should consider, at a minimum, summarily vacating or reversing the Tenth Circuit's judgment, and remanding the case with appropriate instructions.

IV. IN HOLDING THAT THE CURRENT FIFRA PREEMPTS STATE COMMON-LAW TORT CLAIMS OF INADEQUATE WARNING OR LABELING, THE TENTH CIRCUIT HAS WRONGLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

In focusing on issues relating to, first, whether the Tenth Circuit's analysis in this case was inconsistent with this Court's analysis in *Cipollone*, and, second, whether the Tenth Circuit's decision to apply current FIFRA rather than pre-1972 FIFRA to the facts of this case was contrary to express congressional intent and this Court's presumptions and practices regarding statutory retroactivity, AP&G does not mean to obscure two important points about the Tenth Circuit's decision that make this a compelling case for this Court's review.

First, the Tenth Circuit has decided a question of great national importance. By broadly holding that the current FIFRA statute preempts state tort actions based on labeling and alleged failure to warn, the Tenth Circuit has found a congressional intent to completely sweep away injured persons' rights under state common law with respect to inadequate—or even nonexistent—pesticide labels and warnings, without providing any alternative relief for such injured persons. Considering the great

potential for harm arising out of improper use, storage, and disposal of pesticides, the importance of such a holding is manifest. *Cf. Mortier*, 115 L.Ed. 2d at 542 (certiorari granted in light of the importance of the issue of whether FIFRA preempts regulation of pesticides by local governments); *Cipollone*, 60 U.S.L.W. at 4705 (certiorari granted in light of "manifest importance" of preemption issue arising out of federal control over cigarette warning labels). Indeed, evidence of the importance of this issue can be found in the number and geographic diversity of cases involving the issue, *see, e.g., supra* at 12-17, and in the level of participation in these cases by *amici curiae*. *See, e.g.*, App. 1a; Petition for Writ of Certiorari at i n.1, *Papas*.

Second, assuming *arguendo* the applicability of current FIFRA rather than pre-1972 FIFRA in this case, the Tenth Circuit has nevertheless reached the wrong result. As noted earlier, *supra* at 9, under *Cipollone*, the Tenth Circuit should have confined its analysis to a consideration of the express preemptive reach of section 136v(b), which restricts states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." In *Cipollone*, this Court analyzed express preemptive provisions by considering the precise wording of the provisions, the statutory statement of purpose, the regulatory context of the congressional enactments, and general principles of statutory construction that are consistent with the general presumption against preemption. *See* 60 U.S.L.W. at 4707. A similar analysis of section 136v(b) yields the following (necessarily brief) observations.

a.) The language of section 136v, taken as a whole, appears to apply only to state regulation of federally registered pesticides; indeed, subsections (a) and (c) were amended in 1978 to explicitly narrow their scope to federally registered products. *See* Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819, 835. The

Tenth Circuit's broad holding of preemption in the instant case plainly exceeds that scope.

b.) Unlike the statute considered in *Cipollone*, which set forth Congress's purpose of striking a balance between protecting industry interests and adequately informing the public about the hazards of smoking, *see* 60 U.S.L.W. at 4705 n.5 and accompanying text, the language and history of FIFRA reveal no similar congressional purpose behind FIFRA's preemption of state-imposed labeling requirements. Instead, the very heading of section 136v(b) —"Uniformity"—reflects the goal of preventing a multiplicity of conflicting state regulations; indeed, two sections earlier, the statute expressly refers to the goal of "securing uniformity of regulations." *See* 7 U.S.C. § 136t(b). "[T]he term 'regulation' most naturally refers to positive enactments by [legislative and administrative] bodies, not to common law damages actions." *Cipollone*, 60 U.S.L.W. at 4707. Moreover, section 136v(b)'s exclusive concern with uniformity of labeling regulations, rather than preemption of common-law actions, was reinforced when FIFRA was extensively revised in 1988. *See* Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2655. Despite the D.C. Circuit's prior holding in *Ferebee*, and despite the presence and testimony of pesticide industry lobbyists (including representatives of respondent Dow) at the hearings that preceded the 1988 enactment, *see* H.R. Rep. No. 100-939, *reprinted in* 1988 U.S.C.C.A.N. 3474, 3517, the only change made to section 136v(b) was the addition of the heading "Uniformity." "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), and AP&G is unaware of any evidence that Congress was not comfortable with the D.C. Circuit's interpretation of section 136v(b) when it re-enacted the text of that section without change.

c.) As this Court observed in *Cipollone*, "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions," including actions based on failure to warn. *See* 60 U.S.L.W. at 4707. Such preemption is consistent with a reading of the statute as having superseded only positive enactments by legislatures or administrative agencies, *see id.*, and the Tenth Circuit's conclusion to the contrary, *see* App. 8a-10a, was error.

d.) Even if preemptive language regarding state-imposed "requirements" *can* restrict common-law obligations, *cf. Cipollone*, 60 U.S.L.W. at 4708 (rejecting petitioner's argument that the phrase "requirement or prohibition" limited a particular provision's preemptive scope to positive enactments by legislatures and agencies), and even if such language *does* preempt some such claims in the instant case, it should be noted that the language of section 136v(b) preempts only state-imposed "requirements for labeling" that are "in addition to or different from" FIFRA's requirements. The section does not, by its terms, preempt state-imposed "liability" that may arise out of a manufacturer's failure to comply with FIFRA's labeling requirements or standards. *Cf. Cipollone*, 60 U.S.L.W. at 4709 n.24 (discussing possible differences in scope between preemption of state-imposed "requirements" and preemption of state-imposed "liability"). Such state-imposed liability would create no additional or different "requirements for labeling," *see Worm*, 1992 U.S. App. LEXIS 14154, at *14-22, nor would such liability trench on section 136v(b)'s express goal of "uniformity" in labeling requirements.

e.) Finally, this Court has counseled that the purpose of Congress is the "ultimate touchstone" of preemption analysis. *See Cipollone*, 60 U.S.L.W. at 4706. In this regard, where the current FIFRA, unlike the statute considered in *Cipollone*, (i) does not purport to strike a

balance between industry interests and public health, (ii) does not mandate particular labels on products, but instead permits each manufacturer to draft and modify its own product labels subject to certain guidelines, *see generally* 40 C.F.R. Part 152,[13] and (iii) applies to thousands of different products, the dangers of which are not widely known, AP&G suggests that it is highly implausible that Congress would choose, through the language of section 136v(b), to express a "clear and manifest" intention to take away all recourse from persons who are injured by inadequate pesticide labels or warnings. *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, this Court should grant the petition, summarily vacate or reverse the judgment, and remand the case for further consideration in light of this Court's decision in *Cipollone*.

Respectfully submitted,

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[13] Indeed, EPA itself has acknowledged that pesticide companies often voluntarily add "precautionary" statements to their labels, and do so for "liability reasons." *See* 49 Fed. Reg. at 37,971 (1984).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants.

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION; WESTERN ARGICULTURAL CHEMICALS ASSOCIATION; NATIONAL PEST CONTROL ASSOCIATION; NATIONAL AGRICULTURAL AVIATION ASSOCIATION; CHEMICAL SPECIALTIES; AMERICAN WOOD PRESERVERS INSTITUTE; CHEMICAL MANUFACTURERS ASSOCIATION; PRODUCT LIABILITY ADVISORY COUNCIL, INC.; TRIAL LAWYERS FOR PUBLIC JUSTICE,
Amici Curiae.

Appeal from the United States District Court
for the District of Colorado
D.C. No. 89-S-1726

[Filed Mar. 6, 1992]

Richard R. Young (Brent E. Rychener and Walter H. Sargent, with him on the briefs) of Holme Roberts & Owen, Colorado Springs, Colorado, for Plaintiff-Appellee.

David A. Bailey (Dean R. Massey and Anne D. Weber, with him on the briefs) of Parcel, Mauro, Hultin & Spaanstra, P.C., Denver, Colorado, for Defendant-Appellant, Van Waters & Rogers, Inc.

C. Michael Montgomery (Peter S. Dusbabek, Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado; and Edward B. Fitzpatrick, III, The Dow Chemical Company, Midland, Michigan, with him on the briefs), of Montgomery, Green, Jarvis, Kolodny & Markusson, Denver, Colorado, for Defendant-Appellant, The Dow Chemical Company.

Lawrence S. Ebner, McKenna & Cuneo, Washington, D.C.; Charles S. Siegel, Baron & Budd, P.C., Dallas, Texas; and Arthur H. Bryant and Priscilla Budeiri, Trial Lawyers for Public Justice, Washington, D.C., on the briefs for Amici Curiae.

Before LOGAN and MOORE, Circuit Judges, and ALLEY, District Judge.*

MOORE, Circuit Judge.

In 1985 plaintiff Arkansas-Platte & Gulf (AP&G) succeeded to ownership of property in Colorado which previously had been occupied by a wooden fence-post treatment facility. That facility used a pentachlorophenol product, "Dowicide 7," from approximately 1960 to 1972. In 1987, an AP&G employee was diagnosed with pentachlorophenol poisoning. AP&G filed suit in 1989 against Van Waters & Rogers and The Dow Chemical Company as pentachlorophenol manufacturers or distributors, as-

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* The Honorable Wayne E. Alley, United States District Court Judge for the Western District of Oklahoma, sitting by designation.

serting Colorado state tort claims of negligence and strict liability based on a failure to warn of the product's environmental hazards. Dow and Van Waters & Rogers moved for summary judgment, asserting the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (FIFRA), preempts state common law tort claims based on labeling. The district court denied summary judgment, holding there was no express or implied preemption by FIFRA of state tort claims based on negligent failure to warn. *Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 748 F. Supp. 1474, 1482, 1484 (D. Colo. 1990).

On motion of the defendants, the district court certified this question for interlocutory appeal. We may take interlocutory appeals when there is a substantial question of law and an immediate appeal will materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292 (b). We review motions for summary judgment *de novo*. *City of Chanute, Kan. v. Williams Natural Gas Co.*, —— F.2d ——, 1992 WL 12682, at *2 (10th Cir. 1992). *See also Barnson v. United States*, 816 F.2d 549, 552 (10th Cir.), *cert. denied*, 484 U.S. 896 (1987). If no genuine issue of material fact exists,, we determine if the substantive law was correctly applied. *Applied Genetics Int'l v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990), citing *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). There is no dispute of fact on the preemption issue before us. The parties disagree about (1) what body of FIFRA law should be applied, and (2) whether state law is preempted. We reverse the denial of summary judgment to the defendants, and hold FIFRA impliedly preempts state tort actions based on labeling and alleged failure to warn.

I. Applicable Law

AP&G argues its claims originate from actions occurring from 1960 to 1972, and thus FIFRA provisions enacted in 1972 cannot affect defendants' pre-exposure

duties. In the alternative, AP&G asserts neither the 1947 Act nor the 1972 amendments preempt state common law failure to warn claims, and the distinction is unimportant. We disagree with both arguments.

While pre-1972 FIFRA law concerning labeling is similar to the legal regime set forth in the 1972 amendments, it is not identical. FIFRA was enacted in 1947 as a licensing and labeling statute replacing the Insecticide Act of 1910. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991, 104 S. Ct. 2862, 2866 (1984). The 1947 Act gave the Agriculture Department authority to regulate, register, and label "economic poisons and devices." *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 804 (M.D. Fla. 1989). There was no provision in the 1947 Act, however, specifically restricting state authority over pesticide labels.

In contrast, the 1972 amendments significantly strengthened the Act's registration and labeling standards, constructing a comprehensive regulatory regime. *Wisconsin Pub. Intervenor v. Mortier*, —— U.S. ——, 111 S. Ct. 2476, 2480 (1991), citing *Ruckelshaus*, 467 U.S. at 991, 104 S. Ct. at 2867. The 1972 provisions sought to "regulate the use of pesticides to protect man and his environment," and "extend Federal pesticide regulations to actions *entirely within a single State*." *Kennan*, 717 F. Supp. at 804, citing S. Rep. No. 92-838, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993. Section 136v, addressing the "authority of states" provides:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide . . . in the State, but *only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.*
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect *any requirements for labeling or packaging in addi-*

> *tion to or different from* those required under this subchapter.

7 U.S.C. § 136v(a), (b) (emphasis added).

A plain reading of the statute indicates an intent to maintain the traditional police powers of the states in the general grant of authority to "regulate the sale or use" of pesticides, § 136v(a), and a more specific intent to occupy the field in labeling and packaging, § 136v(b). Section 136v(c) further examines the states' prerogatives for registering pesticides for uses to meet special local needs. Clearly if the 1947 Act did not specifically restrict state authority over labeling, the 1972 amendments instruct a different interpretation of the preemption of state law.

Like the district court, we find plaintiff's contention that we should apply pre-1972 FIFRA law unavailing. AP&G relies on *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377 (10th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 799 (1991), arguing the application of current FIFRA law to past events would present a question of retroactivity. *DeVargas* addressed the retroactive application of statutory amendments which became effective during the pendency of that litigation. The court held in the absence of clear congressional intent instructing retroactive application, the law should be applied prospectively. *DeVargas*, 911 F.2d at 1388, 1393.[1]

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[1] *DeVargas* found two lines of Supreme Court precedent, *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 94 S. Ct. 2006 (1974), and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 109 S. Ct. 468 (1988), were in "irreconcilable conflict" in applying statutes whose intent on retroactivity is unclear. *DeVargas*, 911 F.2d at 1390. *Bradley* held when congressional intent is unclear, " 'a court is to apply the law in effect at the time it renders its decision,' " except where application of the law would result in "manifest injustice." *DeVargas*, 911 F.2d at 1388-389, citing *Bradley*, 416 U.S. at 711, 94 S. Ct. at 2016. *DeVargas* found *Bowen* stated a contrary rule, that "congressional enactments and admin-

If this case presented a question of retrospective application of a statute, we would indeed apply *DeVargas*. The issue here, however, does not concern retroactivity, but rather when plaintiff's cause of action arose. Our examination of the claim leads us to conclude it arose after 1972. AP&G acquired its property in 1985, found the property contaminated in 1987, and filed suit in 1989. Even were we to assume plaintiff's cause of action ripened prior to 1972, we have said it is "fundamental" that "a statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to the enactment." *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972), citing *Cox v. Hart*, 260 U.S. 427, 43 S. Ct. 154 (1922). *DeVargas* is therefore not on point.

Furthermore, any jury award on claims arising from a duty to label or warn has an impact on FIFRA as it presently exists. As the court stated in *Kennan v. Dow Chem. Co.*, "[w]hether or not the decedent was exposed prior to 1972 does not negate the fact that a jury award today would constitute regulation by causing manufacturers to change their labels . . . . Congress has expressly preempted such regulation by the states." 717 F. Supp. at 811. We therefore apply FIFRA as amended.

II. Preemption Doctrine

The preemption doctrine is based on the Supremacy Clause of Article Six of the Constitution. U.S. Const. art. VI, cl. 2. The Supremacy Clause invalidates state laws

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istrative rules will not be construed to have retroactive effect unless their language requires this result." *DeVargas*, 911 F.2d at 1389, citing *Bowen*, 109 S. Ct. at 471. "Faced squarely with the issue [of] . . . which presumption—*Bradley* or *Bowen*—is to govern," the *DeVargas* court found *Bowen* was supported by the weight of Supreme Court authority, and held the Civil Rights Restoration Act of 1987 did not apply retroactively. *DeVargas*, 911 F.2d at 1392-93.

that interfere with, or are contrary to" federal law. *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 712, 105 S. Ct. 2371, 2375 (1985), citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) (Marshall, C.J.). The burden of proving preemption is on defendants, who must show Congress meant FIFRA to preempt state tort claims based on failure to warn.

Preemption turns on the intent of Congress and on the effect of the conflicting rule. Intent may be express, *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 1309 (1977), or inferred when Congress has chosen to occupy a particular field and "a scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. at 2481, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947). Even when the field is not occupied, we may still infer preemption to the extent state and federal law conflict. This may be when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S. Ct. 1210, 1217-18 (1963), when federal law implies a barrier to state regulation, *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368, 106 S. Ct. 1890, 1898 (1986), citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941).

III. Failure to Warn Claims Based on Labeling

Several courts have considered whether FIFRA preempts state tort claims based on labeling and alleged failure to warn with conflicting results. The Eleventh Circuit held state common law tort labeling claims are im-

pliedly preempted by FIFRA, 7 U.S.C. § 136v(b). *Papas v. Upjohn Co.*, 926 F.2d 1019, 1024 (11th Cir. 1991), *petition for cert. filed*, 59 U.S.L.W. 3825 (U.S. May 29, 1991) (No. 90-1837).[2] While FIFRA explictly instructs states can regulate the *sale or use* of federally registered pesticides, § 136v(b) precludes "any requirements for *labeling or packaging* in addition to or different from those required pursuant to this act." *Id.* (emphasis added). The *Papas* court reasoned jury awards of damages in these actions would result in direct conflict with federal law. *Id.* at 1025. We agree.

The Administrator of the EPA is charged under the statute with determining whether the pesticide "when used in accordance with widespread and commonly recognized practice . . . will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D). The EPA considers these adverse effects in determining what labels comply with FIFRA's requirements. 7 U.S.C. § 136a(c)(5)(B). The labels "'must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment.'" *Papas*, 926 F.2d at 1024, citing 40 C.F.R. § 156.10(i)(1)(i).

State court damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards. This would hinder the accomplishment of the full purpose of § 136v(b), which is to ensure uniform labeling standards. *Papas* noted even if a state tort action accomplished the same goal as the federal statutory provisions, federal law would still preempt the state action because "it attempts to achieve that

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[2] *Compare Kennan v. Dow Chem. Co.*, 717 F. Supp. at 807 ("FIFRA expressly preempts state law regulation of pesticide labeling . . . .") ; *and Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 406 (E.D. Mich. 1987) ("Congress has expressly stated its intent to preempt **any state labeling or packaging** requirements different from or additional to those mandated by FIFRA," citing § 136v(b)).

purpose by a method which interferes with the federal methods." 926 F.2d at 1026, citing *International Paper Co. v. Ouellette*, 479 U.S. 481, 497, 107 S. Ct. 805, 813 (1987).

We decline to follow the D.C. Circuit's holding in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062, 105 S. Ct. 545 (1984), as suggested by AP&G. *Ferebee* involved a suit by the estate of an agricultural worker against Chevron alleging Chevron's failure to label paraquat with an adequate warning caused Mr. Ferebee's lung disease and subsequent death. The D.C. Circuit held the tort action was not preempted by FIFRA, basing its holding on the general grant of authority to the states in § 136v(a) to regulate the use of FIFRA-controlled products within state borders. *Ferebee*, 736 F.2d at 1541. We do not agree with the D.C. Circuit that because labeling can be part of the compensatory objectives of the state in regulating use, the general grant of § 136v(a) encompasses authority over labeling.[3] Section 136v(b) clearly narrows the general grant of § 136v(a) to *exclude* "requirements for labeling or packaging."

Ferebee distinguished between the "direct" injunction against the states' imposing labeling requirements and requirements which might be imposed through state common law. *Id.* The court reasoned the EPA's determination that Chevron's label was adequate *"for FIFRA purposes* does not compel a jury to find that the label is also adequate *for purposes of state tort law . . . ."* *Ferebee*, 736 F.2d at 1540 (emphasis in *Ferebee*). *Ferebee* further stated:

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[3] "Given this provision [§ 136v(a)], Maryland might well have the power to ban paraquat entirely . . . . As a result, Maryland is entitled to control the use of paraquat for compensatory aims by holding Chevron liable for injuries that could have been prevented by a more adequate label." *Ferebee*, 736 F.2d at 1541.

> The verdict itself does not command Chevron to alter its label—the verdict merely tells Chevron that, if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label . . . .

Ferebee, 736 F.2d at 1541.[4]

We do not accept this "choice of reaction" analysis. A business choice between paying damages and changing the label is only notional. As the First Circuit stated in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987):

> Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take . . . is to change its label.

Id. at 627-28. This choice cannot be consistent with FIFRA's preclusion of "any requirements for labeling or packaging in addition to or different from" the statutory mandate. 7 U.S.C. § 136v(b).

AP&G relies on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S. Ct. 615 (1984), which stated there was no "irreconcilable conflict between the federal and state standards," and that the "imposition of a state standard in a damages action" would not "frustrate the objectives

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[4] *See also Ferebee*, 736 F.2d at 1542 ("Compliance with both federal and state law cannot be said to be impossible: Chevron can continue to use the EPA-approved label and can at the same time pay damages to successful tort plaintiffs such as Mr. Ferebee; alternatively, Chevron can petition the EPA to allow the label to be made more comprehensive.").

of the federal law." 464 U.S. at 256, 104 S. Ct. at 626. We distinguish *Silkwood* because it construes the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, a statute with substantially different regulatory and safety goals from FIFRA. The Atomic Energy Act contains no pre-emption provision and reserves significant authority to the states. "Further, the enactment and legislative history [of the Act] make clear Congress' explicit judgment that state common law damage actions for injuries caused by nuclear operations should be permitted to continue." *Palmer v. Liggett Group*, 825 F.2d at 628. In contrast, FIFRA does specify restrictions on state authority in labeling, and the legislative history of FIFRA is not clear on the queston of state common law tort actions based on labeling and failure to warn.

Our thinking is bolstered by the Supreme Court's recent decision in *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). In *Mortier*, a Wisconsin town granted plaintiff a permit for pesticide spraying with certain use restrictions. Plaintiff claimed the town ordinance was preempted by FIFRA and state statute. The Supreme Court disagreed, holding FIFRA did not preempt political subdivisions from regulating the *use* of pesticides, "either explicitly, implicitly, or by virtue of an actual conflict." *Id.* at 2482. The Court found FIFRA had not occupied the field of pesticide regulation in general or of local use permitting in particular. *Id.* at 2486. According to *Mortier*, the specific grant of authority in § 136v(a) ensures the states can "continue to regulate *use and sales* even where, such as with regard to the banning of *mislabeled products*, a *narrow pre-emptive overlap* might occur." *Id.* (emphasis added).

This "narrow preemptive overlap" is precisely the issue before us. In dicta addressing FIFRA's preemption of labeling claims, the Court stated:

> [F]ield pre-emption cannot be inferred. In the first place, § 136v itself undercuts such an inference. The

> provision immediately following the statute's grant of regulatory authority to the States declares that "[s]uch State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). *This language would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation.*

Id. at 2486 (emphasis added).[5]

Thus, the Supreme Court reasoned Congress had not occupied the entire field of pesticide regulation, instead leaving intact the states' historic police powers to consider regional and local factors in regulating *use*. The Court indicated, however, Congress had impliedly preempted state regulation in the more narrow area of *labeling*. While the holding of *Mortier* is confined to the regulation of pesticides by local governments, *id.* at 2479, we are nevertheless inclined to adopt its construction of FIFRA.[6]

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[5] *See also* 111 S. Ct. at 2487. "As we have . . . made plain, local use permit regulations—*unlike labeling or certification*—do not fall within an area that FIFRA's 'program' pre-empts or even plainly addresses." (emphasis added).

[6] Several district courts have considered preemption with respect to labeling and failure to warn claims since *Mortier* and followed its dicta. *See, e.g., Young v. American Cyanamid Co.*, Civ. No. B-C-90-89 (E.D. Ark. N.D. Oct. 21, 1991) (unpublished order); *Worm v. American Cyanamid Co.*, Civ. A. No. HAR-90-1424, 1991 WL 144328 (D. Md. July 12, 1991) (unpublished opinion). *Cf. Montana Pole & Treating Plant v. I.F. Laucks*, 775 F. Supp. 1339 (D. Mont. 1991) (adopting *Ferebee* and declining to follow *Papas* in case involving labeling of pentachlorophenol). In our opinion, *Montana Pole* wrongly relies on *Mortier* without considering the Court's distinction between preemption of state regulation of the *sale and use* of pesticides, and state authority over *labeling*. *Montana Pole*, 775 F. Supp. at 1344.

IV. Summary

We therefore hold state tort actions based on labeling and alleged failure to warn are impliedly preempted by FIFRA as a matter of law. This is by virtue of the direct conflict posed with federal uniform regulation of pesticides, and because we believe Congress intended to occupy the field of pesticide labeling regulation. We base our holding on the language of § 136v, our rejection of the *Ferebee* court's "choice of reaction" analysis, and our understanding of the Supreme Court's construction of FIFRA in *Mortier*. We need not reach the district court's holding there is no express FIFRA preemption, and emphasize our holding only concerns the narrow issue of labeling. We do not address other state tort claims by AP&G which may be pending against the defendants.[7]

We therefore REVERSE the decision of the district court denying defendants' summary judgment on plaintiff's state tort claims based on labeling and failure to warn, and REMAND for further proceedings.

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[7] *See, e.g., Kennan*, 717 F. Supp. at 812 (while finding express preemption of failure to warn claims in § 136v(b), court "state[d] no view as to whether . . . defense of unavoidable dangerousness ha[d] been preempted"); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283, 1289 (W.D. Mo. 1989) (FIFRA preempts common law failure to warn claims, but not claims that herbicide sold in unreasonably dangerous condition).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE DANIEL B. SPARR

Civil Action No. 89 S 1726

ARKANSAS PLATTE & GULF PARTNERSHIP,
Plaintiff,

v.

VAN WATERS & ROGERS INC., *et al.*,
Defendants.

ORDER

[Filed Oct. 22, 1990]

THIS MATTER comes before the Court on Defendant Dow Chemical's motion for summary judgment, filed January 31, 1990. Oral argument on the motion was heard August 13, 1990.

PROCEDURAL BACKGROUND

Defendant Dow Chemical [1] bases its brief in support of summary judgment on three contentions: (1) the alleged failure to warn on the part of Defendant Dow, if any, did not cause plaintiff's damages as a matter of law; (2) Plaintiff lacks standing to bring an action for the property damages it seeks; and (3) Plaintiff's state law tort claims are preempted by federal law and accordingly are barred.

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[1] Defendant Van Waters & Rogers has joined in the relevant pleadings by Dow Chemical in support of its motion for summary judgment.

At the hearing of Defendant's motion, the first argument was withdrawn, as the Defendant conceded that the causality question was factual in nature. At that time, the Court also denied the second argument, determining that the standing issue concerned assignment which was an issue of fact. Having determined that summary judgment was improper on the Defendant's first two arguments, the Court took under advisement the third argument, concerning application of the preemption doctrine. This order will address exclusively the preemption argument.

Defendant Dow Chemical (hereafter "Dow"), alleges that the statutory scheme of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") found at 7 U.S.C. § 136 et seq., preempts the Plaintiff's cause of action cognizable under state tort law arising from an alleged failure to warn due to the inadequacy of the labeling of the chemical "Dowicide 7." [2]

FACTUAL BACKGROUND

It is undisputed that, during the years 1960-1972, Plaintiff's predecessors operated a wooden fence post treatment facility on their ranch property. The posts were soaked in a pentachlorophenol solution which greatly increased the durability of the posts. The chemical used in the procedure is more commonly referred to as "penta." Defendant's product "Dowicide 7" is a form of penta.

Plaintiff instituted this lawsuit claiming that the penta which was spilled or otherwise came into contact with the property caused the ranch to become a contaminated site. In their complaint, Plaintiff makes a negligent failure to warn claim, alleging that, among other things, the Defendants failed to provide any warning to the owners (of the property) of the potential environmental risks or hazards to the property which might result from such use.

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[2] With regard to the Plaintiff's strict liability claim, the Defendant, relying on the decision of *Kennan v. Dow Chemical*, 717 F.Supp. 799 (M.D. Fla. 1989) makes no claim of preemption.

Plaintiff commenced the suit after it discovered penta contamination after the soil was tested. The soil tests were undertaken after the notification of the Plaintiff by one of its employees, Edward Seger, that he had been diagnosed as having penta poisoning. The Plaintiff's cause of action, however, does not concern Seger's personal injury.

Before this Court undertakes any analysis of the preemption question as it relates to FIFRA, and in particular the negligent failure to warn claim, it must be noted that there are several courts which have already considered this very question, and many more that have dealt with other questions regarding preemption. These cases will be noted and, where appropriate, discussed.

The wealth of case law on this issue is somewhat puzzling. The cases provide almost an even split of authority. There are some threads of consistency in determining some of these preemption questions. This Court will attempt to undertake an analysis which is not necessarily outcome determinative.

THE PLEADINGS

Defendant Dow Chemical filed its motion for summary judgment on January 31, 1990. Dow relies on two arguments in its preemption argument: (1) FIFRA preempts Plaintiff's negligence claim due to its comprehensive regulation of pesticides (focusing on the FIFRA provision found at 7 U.S.C. § 136v(b), entitled "uniformity," under the heading of 136v for "Authority of States." That provision states: "such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act."); and (2) Plaintiff's tort claim based on the inadequacy of the label must fail as FIFRA prohibits any state regulation of the area of labeling, and any recovery under state law would, in effect, amount to prohibited regulation. Dow

relies heavily on the preemption analysis of *Kennan*, 717 F.Supp. 799 and *Fitzgerald v. Mallinckrodt*, 681 F.Supp. 404 (E.D. Mich. 1987).

Plaintiff's opposition was filed March 9, 1990. Plaintiff argued that there was no preemption of its negligence claim, relying on *Ferebee v. Chevron Chemical Co.*, 736 F. 2d 1529 (D.C. Cir. 1984) *cert. denied* 469 U.S. 1062 (1984) rejected Dow's arguments that EPA approval of a manufacturer's claim did not compel a jury to find the same, and distinguishing the different, but not competitive, goals of FIFRA and state tort law. Plaintiff maintained that the requirement of EPA approval of label does not prevent state from furthering traditional tort goals. Plaintiff cites to several cases which have adopted the *Ferebee* reasoning, or cited it with approval. (Including several federal as well as state cases.) Plaintiff also argues that since the FIFRA was extensively revised by Congress in 1988, after the *Ferebee* decision, and no effort was made to statutorily overrule the decision, it can be presumed that Congress has adopted that interpretation of FIFRA. Plaintiff criticizes also the *Fitzgerald* case for its reliance on *Palmer v. Liggett Group*, 825 F. 2d 620 (1st Cir. 1987), a case concerning the Cigarette Act. Plaintiff undertakes a rudimentary preemption analysis, and urges the Court to align itself with those decisions finding no preemption.

At oral argument of the motion before this Court on August 13, 1990, the Plaintiff raised an additional argument, to which Dow has responded, which urges the Court to apply pre-1972 law to Plaintiff's claims. This argument was effectively raised at the time of the hearing [3] and Dow filed its supplemental response on August 17, 1990. The Court will not concern itself with any analysis of pre-

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[3] The argument was first raised by Plaintiff in a pleading filed (Friday) August 10, 1990 at 4:55 p.m. The oral argument was held the morning of August 13, 1990.

1972 FIFRA law and the status of Plaintiff's tort claims under such provisions. Plaintiff's arguments are unavailing and would only provide unnecessary confusion to the already muddy waters of preemption doctrine analysis. Because it appears that some of Plaintiff's claims may not have existed under pre-1972 FIFRA analysis, and the fact that the Court is bound to apply the law in effect at the time it renders its decision, unless there would result a manifest injustice, *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974), this order will not consider the pre-1972 FIFRA argument.

PREEMPTION DOCTRINE ANALYSIS

At the outset it must be noted that the Court properly considers a number of factors when undertaking a preemption analysis of statutory language or common law on either the federal or state level. The court must consider the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written. *Jones v. Rath Packing*, 430 U.S. 519, 526 (1977).

The burden of proving preemption is on the movant. Dow must show that Congress intended to preclude state tort damage awards when it promulgated 7 U.S.C. § 136v (b) or as reflected in the FIFRA statute as a whole. The question is more accurately directed not towards whether Congress expressly allowed such damage awards, but rather, since tort damage awards have long been a part of traditional state tort law, to the question of whether Congress expressly supplanted them. Without an express preclusion of such awards, it must be assumed that such tort law principles would apply with full force and effect. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).[4] Dow must overcome this burden.

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[4] Is should be noted here, however, as the court in *Palmer v. Liggett Group, Inc.*, 825 F.2d at 628, pointed out, the *Silkwood* case involved the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, which contained no preemption provision.

1. The Historical Underpinnings of the Preemption Doctrine

The Supremacy Clause of Article XI, clause 2 of the United States Constitution provides: "[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme law of the land. . . ." U.S. Const., Art. VI, cl. 2. It is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that "interfere with, or are contrary to," federal law. *Hillsborough County, Fla. v. Automated Medical Labs*, 471 U.S. 707, 713 (1985), *citing Gibbons v. Ogden*, 9 Wheat. 1 (1824).

The preemption clause may apply to federal common law as well as state statutory or common law. Justice Rehnquist noted this distinction in *Milwaukee v. Illinois*, 451 U.S. 304 (1981):

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' (Quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).)

The Supreme Court has articulated in *Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 476 U.S. 355 (1986) an oft-cited listing of factors for preemption analysis, which has served to be instructive to many courts, but nonetheless offers little help in providing any practical means of analysis or "test" for trial courts:

> The Supremacy Clause of Article VI of the Constitution provides Congress with the power to pre-

empt state law. Premption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, *e.g.*, *Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and having no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

See *Palmer v. Liggett Group, Inc.*, 825 F.2d at 624-625.

2. The Various Levels of Preemption Analysis

As evidenced by the listing of factors above in *Louisiana Public Service*, the court may consider any number of factors in its preemption analysis. This seems to be part of the problem and may lie at the source of the widely divergent decisions concerning application of preemption analysis. It is apparent that these factors, which were not intended to be an exhaustive treatment of the matter, must be tailored to the particular statute and regulatory scheme promulgated by Congress with a view to determining how the state law (as distinguished from the federal common law) or regulation may affect the federal provisions. In view of the cases on the subject, it is apparent that the only workable "test" is one which considers the statutory language, the entire statute, and its legislative history if necessary, in light of its relationship to the state common law provisions.

3. The Test

A. Express Preemption

Express preemption arises only in certain limited circumstances. Statutes which expressly supersede state law are not common. To determine whether there is express preemption, the court must consult the statute. *Louisiana Public Service*, 476 U.S. at 368. With regard to a finding that no express preemption exists, it is not necessary for a federal statute to provide explicitly that particular state laws are preempted. *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) citing *Hillsborough County*, 471 U.S. 707.

(1) Examination of Statutory Provisions

Although inquiry into legislative motive is often an unsatisfactory venture, *United States v. O'Brien*, 391 U.S. 367, 383 (1968), it nonetheless may be necessary to the determination of the controversy before the court. All provisions in a statute should be given effect. *See U.S. v. Menasche*, 348 U.S. 528, 538-539 (1990). If express preemption is not found by the language of the statute,[5] then the next level of analysis concerns implied preemption. The difficulties of consistent preemption analysis generally begin with implied preemption, as the several factors of that analysis allow the courts a great amount of discretion to determine whether Congress impliedly preempted state laws or regulations. As the First Circuit noted in *Palmer*, the gist of preemption is whether Congress (expressly) did or (impliedly) meant to displace state law or state law concepts in enacting the federal law. *Palmer*, 825 F. 2d at 625-626.

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[5] One court addressing the FIFRA statute in a preemption context, did find there was express preemption of the plaintiff's claim based on negligent labeling and failure to warn based on the statutory provision of 7 U.S.C. § 136v(b). *Fitzgerald v. Mallinckrodt*, 681 F.Supp. at 407. To this Court's knowledge, the *Fitzgerald* court is the only court to have found such language to expressly preempt such a claim under FIFRA.

B. Implied Preemption

Implied preemption presents questions which are completely different from the more superficial analysis required in express preemption. The broader issue here arises from the very fact that Congress acted. The court must look at the consequences of that action. The Supreme Court noted recently in *English v. General Electric Co.*, 110 S.Ct. 2270, 2279 (1990):

> Ordinarily, the mere existence of a federal regulatory or enforcement scheme . . . does not by itself imply preemption of state remedies. The Court has observed: 'Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law. . . . Instead, we must look for pre-emption.'

(Citing *Hillsborough County*, 471 U.S. at 719.)

On the other hand, it must be noted that "it is not necessary for a federal statute to provide explicitly that particular state laws are preempted." *Ouellette*, 479 U.S. at 491, citing *Hillsborough County*, 471 U.S. at 713.

The more difficult questions begin here: did Congress impliedly preempt the awarding of state tort law damages by a jury when it promulgated 7 U.S.C. § 136v(b)? Some courts have formulated the answer to this question by essentially asking a different question: does the award of damages by a jury amount to state regulation of labeling and packaging which the Congress impliedly preempted in § 136v(b)?

To determine what Congress may have implied, it is necessary to consider the statutory provision in its proper context—the statute as a whole.

Two primary considerations must be noted in the implied preemption context:

(1) the problem of resolving the potential conflict between § 136v(a) and § 136v(b). Several courts have not entertained any alternative to the application of § 136v(b) to a plaintiff's state tort law claims for negligence arising from inadequacy of the label. Other courts have noted the provision of § 136v(a) which specifically allows the states to regulate the use of pesticides by states. This is but one of the conflicts created by the divergence of case authority on this subject.

(2) arising from (1) but also standing alone to a certain extent is the (revisited) question of congressional intent. The purpose of the statute is the "ultimate touchstone" of supremacy clause (preemption doctrine) analysis. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987).

Because the whole notion of implied preemption concerns the interpretation of congressional intent and purpose from the statutory language and history, it is important to keep in mind these basic rules of preemption doctrine analysis and construction:

(1) Congressional Purpose

As noted above, there is a wide divergence of case authority as to the statutory purpose and intent of Congress in promulgating the FIFRA and its regulatory scheme. This divergence applies not only to the particular provisions (*e.g.*, §§ 136v(a) and 136v(b)) and how courts have construed their relationship to the FIFRA as a whole, but also to the overall Congressional purpose in enacting FIFRA. It must be recognized that the relationship between the parts and the whole is a crucial one. Although many courts have deemed the analysis of Congressional intent as distasteful, this Court would be shirking its duties if it dismissed such analysis. The court is left no choice but to examine Congressional intent

where there is no express preemption. If the Court found no express preemption, but failed to make an examination of the statutory purpose, the court would effectively be allowing preemption of state laws or regulations merely because the Congress has taken some sort of action in the area.

Congressional Occupation of the Field

Congressional purpose is a legitimate determination in considering the factors of implied preemption. The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme. *Hillsborough County*, 471 U.S. at 714. Although occupation of the field is an otherwise established factor of preemption analysis, the *Silkwood* court noted in considering a state law punitive damages claim which defendants contend was preempted by the Nuclear Regulatory Act (which as previously noted did not contained a preemption clause) that occupation of the field was not the appropriate test, but rather whether, "there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." 464 U.S. at 256.

Conflict of State Law with Federal Law

The tests which follow the field preemption factor may be characterized as an extension of that test, but are also distinct. The possible incompatibility of the state with the federal law must be examined.

(1) actual conflict

In addition to express or implied preemption, a state law also is invalid to the extent that it "actually conflicts with a . . . federal statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). See also, *Pacific Gas*

& Electric Co. v. State Energy Resources Conservation, 461 U.S. 190, 204 (1983).

(2) potential conflict

A relevant question here is whether compliance with both is impossible. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). A conflict which is not otherwise an "actual conflict" will also be found when the state law "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *International Paper Co. v. Ouellette*, 479 U.S. at 492, citing *Hillsborough County*, 471 U.S. at 713.

Incompatibility of State Law with Federal Goals

This is a broad question. It must take into consideration the interests of the state through its tort law, to provide compensation for injuries to its citizens and the federal government, in providing uniform regulation of chemicals used in FIFRA. Whether the court chooses to recognize so or not, the distasteful act of divining congressional intent is of necessity in any substantial preemption analysis, as implied preemption analysis, almost by definition, requires such an undertaking. The balancing of these competing interests has been recognized in the area of intellectual property, where the interest of the federal government, as well as that of the states, is carefully guarded.[6] One particularly relevant question for this stage of analysis is whether Congress intended a balance be struck in the statutory scheme as a whole.

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[6] In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, Justice O'Connor noted the Court's history of analysis with regard to the field of intellectual property: "[t]hus our past decisions have made clear that state regulation of intellectual property must yield to the extent that it clashes with the valance struck by Congress in our patent laws. . . . Where it is clear how the patent laws strike that balance in a particular circumstance, that is not a judgment the States may second guess. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989).

This is particularly apparent when the statutory provisions are considered as a whole, with particular attention paid to the provisions regarding state competence in §§ 136v(a) and (b). The balance between state and federal authority can be distinguished at the level of implied preemption in the aforementioned ways because "we must bear in mind that not every state law that in some remote way may affect the [Congressionally occupied field] . . . can be said to fall within the preempted field. *English v. General Electric Co.*, 110 S.Ct. at 2278.[7]

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[7] In this recent decision, the Supreme Court reviewed the preemption of a plaintiff's claim for intentional infliction of emotional distress by a portion of the Energy Reorganization Act of 1974. The *English* Court considered three questions in particular in examining the preemption issue:

> (1) [C]ongress can define explicitly the extent to which its enactments pre-empt state law. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983). Pre-emption fundamentally is a question of congressional intent, see *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988), and when Congress has made its intent known through explicit statutory language, the court's task is an easy one.
>
> (2) [I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal inteerst is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "[W]here . . . the field which Congress is said to have pre-empted" includes areas that have traditionally been occupied by the States," congressional intent to supersede state laws must be " 'clear and manifest.' " *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) . . .
>
> (3) [S]tate law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply

APPLICATION OF THE ANALYSIS TO THE PRESENT CASE

Presented with this veritable smorgasbord of factors for consideration of this motion, the Court will apply the following test, which is premised on U.S. Supreme Court holdings on appropriate factors, as well as a context for their proper consideration.

With regard to the application of the test, the Court will examine two relevant portions of FIFRA, §§ 136v(a) and 136v(b). Both sections are discussed here based on the common factors applicable to them. While Plaintiff may characterize its claim as arising from the "use" of a pesticide, and consequently to which § 136v(a) would apply, the Defendant would characterize the claim as falling under § 136v(b), based on a damage award serving as an indirect regulation of labeling. Because the Court wishes to rise above any semantic distinction based on the particular terms used in the pleadings and relevant papers in this case, and because it feels compelled to examine statutory sections in their proper context, the application of the test will include both sections.

1. *EXPRESS PREEMPTION: Is there specific statutory language evidencing congressional intent to preempt state law?*

The relevant portion of FIFRA is found at 7 U.S.C. § 136v., entitled "Authority of States."

Analysis of § 136v(a), entitled "In general." This section provides: "A State may regulate the sale or use of

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with both state and federal requirements, see, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See also *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981).

English v. General Electric, 110 S. Ct. at 2275.

any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act." This section is clearly an affirmative grant of authority to the states to regulate.

Analysis of § 136v(b), entitled "Uniformity." This section provides: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act." Here it is apparent that, by reading this section both in its statutory context, as well as in light of the state law here concerned, there can be no express preemption. The statutory language is not so explicit as to warrant a finding of express preemption where both of the other subsections of § 136v describe affirmatively the state regulation of pesticides, and where the particular admonition to the states does not describe in any meaningful way which action or type of action is prohibited. There certainly is no mention of preemption of state tort claims in § 136v (b).

Accordingly, there is no express preemption found under either of the FIFRA sections under scrutiny here.

2. IMPLIED PREEMPTION

A. OCCUPATION OF THE FIELD: Does state law regulate conduct in a field that Congress intended the Federal Government to occupy exclusively?

The state law under scrutiny here is neither a statute nor a regulation of pesticides (or their labels). Rather, it is the Colorado common law tort of negligence. With this in mind, the Court will consider the federal government's action in the field, namely FIFRA.

FIFRA, at 7 U.S.C. § 136 *et seq.*, provides a means for protecting health, the environment and regulating standards. The regulatory scheme under FIFRA applies to

some 40,000 chemicals or mixtures of chemicals used as pesticides. The Act classifies the pesticides and provides a framework for their registration with the Administrator (of the Environmental Protection Agency). The vast majority of statutory provisions concern the manufacture and sale, and penalties for improper use of pesticides. Registration of a pesticide is done by its manufacturer. If there is more than one manufacturer of a pesticide, there is no standard mandating that the Administrator insure uniformity in that only one (standard) label may issue.[8]

Occupation of the field may be inferred from a pervasive scheme of federal regulation. The scheme of federal regulation under FIFRA does not easily lend itself to a characterization as "pervasive" except as relates to the registration of pesticides, and even in that area there exists much flexibility (albeit under the authority of the EPA Administration).

With regard to § 136v(a), the affirmative grant of authority to states to regulate the sale and use of pesticides remains intact. No occupation of the field is evident here.

With regard to § 136v(b), a certain caveat must be noted: where the field which Congress is said to have preempted includes areas that have been traditionally occupied by the States, congressional intent to supersede must be clear and manifest.[9] Due to the nature of the state law concerned, it remains unclear that the congressional intent under § 136v(b), as well as that supported by the statutory scheme as a whole, was intended to displace the otherwise available state tort remedy.

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[8] See *Palmer v. Liggett Group* for distinctions drawn between the scheme of federal regulation between FIFRA and the Cigarette Act. 825 F.2d at 628-629.

[9] *See English v. General Electric Co.*, 110 S. Ct. at 2275, citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Having determined that field preemption is not indicative of any congressional intent to preempt the Plaintiff's state tort claim, the Court now turns to the two remaining factors of implied preemption.

B. ACTUAL CONFLICT: Is it impossible for a private party (i.e., Dow) to comply with both state and federal requirements?

The state law requirement for the tort of negligent failure to warn would dictate that the manufacturer (or perhaps seller or distributor) exercise the requisite duty of care (assuming such duty is found to exist) to warn of any dangerous properties which could cause harm to Plaintiff or his property through the use of pesticides.

The federal law requirements in this regard mandate simply that the manufacturer register the pesticide, and prescribes the manner in which this is done. The FIFRA does not mandate such registration procedure for any stated purpose other than regulating pesticides and their use for the protection of humans and the environment. With such broadly stated goals in mind, the FIFRA provides a framework for regulating standards within the pesticide industry. The dearth of specific provision as to how such goals might be carried out is indicative of FIFRA's nature as setting forth minimum standards. These minimum standards stand in sharp contrast to other congressional regulatory schemes.[10]

For these reasons, there exists no actual conflict between the state law requirements and federal law requirements in FIFRA under either § 136v(a) or § 136v(b). There is no reason why a private party, situated as Dow is, could not comply with both sets of requirements.

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[10] Other regulatory schemes which indicate much more thorough involvement by the federal government include: intellectual property, *see Bonito Boats*, 489 U.S. at 152; labor relations, *see English*, 110 S. Ct. at 2279, n.8; and the Cigarette Act, *see Palmer*, 825 F.2d at 628.

C. POTENTIAL CONFLICT: Is the state law incompatible with federal goals? OR Did Congress leave no room for supplementary state regulation?

With regard to this question and its consideration after the actual conflict issue, it may appear academic to examine this question. However, the Court will undertake consideration of this question as it is possible that although no actual conflict exists, due to the nature of the relationship between the two sets of "regulation," a conflict could arise.

It goes without saying that the Court could not consider the question of whether a conflict will arise, as no such issue is presented, and if it were, it certainly would not be ripe for consideration at this time.

Once again, the Court must note the distinction between the two statutory sections under consideration here. Because the grant of authority contained in § 136v(a) for regulating the use of pesticides allows the states broad authority to regulate in that area, no potential conflict could arise here.

With regard to § 136v(b), however, the test at this point is critical as it hinges on interpretation—both of congressional intent and the type of state regulation which it prohibits. It must be noted again here, that the court is required to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. *Jones v. Rath Packing Co.*, 430 U.S. at 526. With the federal statute and its relevant regulations under consideration, the Court notes that the basic purpose of the statute is to regulate the labelling of such products to provide purchasers with assurance of effectiveness and safety when used in compliance with the manufacturer's instructions. *Roberts v. Dow Chemical Co.*, 702 F. Supp. 195, 196 (N.D. Ill. 1988) citing *Continental Chemiste Corp. v. Ruckelshaus*, 461 F. 2d 331, 335 (7th Cir. 1972).

In light of the meaning of § 136v(b) in context of the overall statutory purpose of FIFRA, the Court will now consider the consequences which the state law may have on this federal scheme of regulation. The state tort claim here at issue is an interest which may be characterized as "peculiarly local" in concern, due to its nature as a common law claim for negligence.[11] Any potential conflict which might arise from a jury award of damages cannot be characterized as a conflict with the statutory regulation scheme of FIFRA due to its failure to address any aspect of state tort recovery in either its statutory language or its regulations. It cannot be assumed that because it failed to specifically mention this possibility, it is nonetheless foreclosed. FIFRA's relatively flexible nature of regulating pesticides and their distribution forecloses such a conclusion.[12]

This Court accordingly finds that there is no potential conflict between the state tort claim and the FIFRA provision of § 136v(b).

In conclusion, the Court finds that there is no potential preemption of Plaintiff's state tort law claim for damages based on negligent failure to warn.

It is therefore ORDERED, Defendant Dow Chemical Company's motion for summary judgment is DENIED.

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[11] This "peculiarly local" classification is of concern here also with regard to whether Congress intended to displace the state tort claim for damages. *See National Agricultural Chemicals Association v. Rominger*, 500 F. Supp. 465, 470 (E.D. Cal. 1980), citing *Florida Lime*, 373 U.S. at 146.

[12] One court has characterized this relationship in a somewhat similar manner with regard to implied preemption analysis: [t]he fact that EPA has determined that Chevron's label is adequate *for purposes of FIFRA* does not compel a jury to find that the label is also adequate *for purposes of state tort law* as well." (Emphasis in original.) *Ferebee v. Chevron Chemical Co.*, 736 F.2d at 1540.

DATED at Denver, Colorado, this 22nd day of October, 1990.

BY THE COURT:

/s/ Daniel B. Sparr
DANIEL B. SPARR
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE DANIEL B. SPARR

Civil Action No. 89 S 1726

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation;
and XYZ COMPANIES,
Defendants.

ORDER

[Filed Jan. 22, 1991]

THIS MATTER comes before the Court on Defendant The Dow Chemical Company's motion for reconsideration of the Court's order entered October 22, 1990. The Defendant seeks this Court's reconsideration or amendment of its Order denying the Defendants' motion for summary judgment. As its basis for reconsideration or amendment, Dow Chemical Company asserts that the Court improperly considered its motion for summary judgment as limited only to preemption of Plaintiff's negligent failure to warn claim. Dow Chemical asserts that its motion was directed at *any* failure to warn claim, regardless of legal theory.

At this time the Court merely wishes to note that it appears the Defendant Dow Chemical Company is essentially seeking reargument of its motion. At the hearing on this motion, Defendant Dow Chemical relied primarily

on the decision in *Kennan v. Dow Chemical Co.*, 717 F. Supp. 799 (M.D. Fla. 1989) for its argument that FIFRA (Federal Insecticide, Fungicide and Rodenticide Act) preempts state law failure to warn claims (transcr. at 7). Both the *Kennan* court, as well as the argument forwarded by the Defendant Dow Chemical Company, rely for support on the earlier decision of *Fitzgerald v. Mallinckrodt, Inc.*, 681 F.Supp. 404 (E.D. Mich. 1987): "FIFRA's preemption of state law claims based on theories of negligent labeling and failure to warn was recognized in *Fitzgerald . . .*" *Kennan*, 717 F.Supp. at 805. Of particular note is the court's ruling in *Kennan*, which states: "To the extent that plaintiff's claims are based on the defective and unreasonably dangerous condition of defendants' products due to defendants' failure to warn, plaintiff's claims are preempted as a matter of law. To the extent that plaintiff's claims are otherwise based on the defectiveness or unreasonable dangerousness of defendants' product on theories of defective design or manufacturing flaw, the motion for summary judgment is denied." *Id.* at 812.

Accordingly, the Defendant Dow Chemical Company's motion to reconsider is DENIED.

The Court hereby certifies its order of October 22, 1990 denying summary judgment for appeal pursuant to 28 U.S.C. 1292(b). Further proceedings in this matter shall not otherwise be stayed by this Court unless a party requests a stay of the proceedings within 10 days of this Order.

DATED at Denver, Colorado, this 22 day of January, 1991

BY THE COURT:

/s/ Daniel B. Sparr
DANIEL B. SPARR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-527

THE DOW CHEMICAL COMPANY;
VAN WATERS & ROGERS, INC.,
Petitioners,

v.

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Respondent.

ORDER

Filed February 26, 1991

Before LOGAN and EBEL, Circuit Judges.

This matter comes on for consideration of the petition of The Dow Chemical Company and Van Waters & Rogers, Inc. for permission to appeal under 28 U.S.C. Section 1292(b).

Upon consideration whereof, the petition for leave to appeal is granted.

The date of this order shall serve as the date of the notice of appeal for calculating filing times under the Federal Rules of Appellate Procedure and the Tenth Circuit Rules. Briefing shall follow 10th Cir. R. 31.1.

Entered for the Court

ROBERT L. HOECKER
Clerk

By: /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1085

(D.C. No. 89-S-1726)

ARKANSAS-PLATTE & GULF PARTNERSHIP,
a Colorado general partnership,
Plaintiff-Appellee,

v.

VAN WATERS & ROGERS, INC., a Washington corporation;
THE DOW CHEMICAL COMPANY, a Delaware corporation,
Defendants-Appellants.

ORDER

Entered April 16, 1992

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges, and ALLEY*, District Judge.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

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* The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

SUPREME COURT OF THE UNITED STATES

No. A-7

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner

v.

DOW CHEMICAL COMPANY, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 31, 1992.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 1st day of July, 1992.